

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 13, 2024

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, and section 115 of the *Water Act*, RSA 2000, c W-3;

-and-

IN THE MATTER OF appeals filed by Dale Christian, Trevor Christian, Tanya Christian, John McKechnie, and Adele McKechnie, with respect to *Water Act* Licence No. 00432249-00-00 and Approvals DAUT0012377, DAUT0012378, and DAUT0012379 issued to Howell's Excavating Ltd. by the Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas.

Cite as: Stay Decision: *Christian et al. v. Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas*, re: *Howell's Excavating Ltd.* 13 May 2024), Appeal Nos. 23-002-011 and 23-027-036-ID1 (AEAB), 2024 ABEAB 17.

BEFORE:

Chris Powter, Acting Board Chair, * Line Lacasse, Board Member, and Kurtis Averill, Board Member

PARTIES:

Appellants:

Dale Christian, Trevor Christian, Tanya Christian, Adele McKechnie, and John McKechnie, represented by Richard Harrison, Wilson Laycraft LLP.

Approval and Licence Holder:

Howell's Excavating Ltd. represented by Nickolas Bailey, Altalaw LLP.

Director:

Todd Aasen, Regulatory Assurance Division South, Alberta Environment and Protected Areas, represented by Larry Nelson and Erika Gerlock, Alberta Justice.

* Chris Powter was the Acting Board Chair at the time the decision was made.

EXECUTIVE SUMMARY

The Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas (the Director) issued three approvals and a licence under the *Water Act*, to Howell's Excavating Ltd. (the Authorization Holder) for the purposes of gravel extraction (the Authorizations). The Authorizations were appealed to the Environmental Appeals Board by Dale Christian, Tanya Christian, Trevor Christian, Adele McKechnie, and John McKechnie (collectively, the Appellants). The Appellants applied for a stay of the Authorizations.

The Board established a process for receiving written submissions on the stay application, including whether the Appellants were directly affected by the Authorizations. The Appellants objected to the Board's stay process, arguing that there was no requirement for the Board to decide that a party is directly affected prior to issuing a stay or before proceeding to a hearing. The Appellants further argued the Authorization Holder and the Director should be bringing the motion challenging the Appellants' standing, and therefore, those parties bear the onus of proving the Appellants are not directly affected. In light of the Appellants' concerns, the Board sought submissions addressing the arguments raised by the Appellants.

After review of the submissions, the Board determined the Appellants are directly affected. As the principal application before the Board was a stay application, and the Appellants were directly affected for the purposes of that application, it was not necessary for the Board to make additional findings relative to the timing for an appellant to be found "directly affected" during the appeal process. Consequently, the Board declined to make any further determinations on whether a party must be determined to be directly affected prior to issuing a stay, or before proceeding to a hearing. The Board noted however, the onus for proving an appellant is directly affected rests on the appellant.

With respect to the application for the stay, the Board found that there is a serious issue to be tried. However, the Appellants failed to establish irreparable harm and that the balance of convenience favours the granting of a stay. The Board further found it would not be just and equitable to grant the request for a stay. As a result, the Board denied the stay request.

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1. INTRODUCTION

[1] This is the Environmental Appeals Board's (the "Board") decision on a request for a stay of the decision of the Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas, to issue *Water Act* Licence No. 00432249-00-00 (the "Licence") and *Water Act* Approval Nos. DAUT0012377, DAUT0012378, and DAUT0012379 (the "Approvals") to Howell's Excavating Ltd. (the "Authorization Holder").

[2] The stay was requested by Dale Christian, Tanya Christian, Trevor Christian, Adele McKechnie, and John McKechnie, (collectively, the "Appellants")¹.

[3] The Board has reviewed the written submissions received from the Appellants, the Authorization Holder, and the Director (collectively, the "Parties") and determined that a stay is not warranted and denied the Appellants' application for a stay.

[4] The Board's reasons are below.

2. BACKGROUND

2.1 The Approval and Appeal Process

[5] On May 30, 2023, the Director issued the Licence and Approvals to the Authorization Holder under the *Water Act*, RSA 2000, c. W-3 (the "*Water Act*").

[6] On May 31, 2023, Environment and Protected Areas ("EPA") notified Dale Christian, Adele McKechnie, and John McKechnie, of the Director's decisions to issue the Licence and Approval No. DAUT0012377 ("Approval 1").

[7] Together, the Licence and Approvals (collectively, the "Authorizations") were issued for the purposes of aggregate extraction. The Approvals authorize the Authorization Holder to disturb groundwater, construct berms for flood control purposes, and develop two end pit lakes at SE-13-26-2-W5, in Red Deer County (the "Property"). The Licence authorizes the operation of

¹ Note that the Authorizations were also appealed by John Harris, Sybil Harris, Stacey Homer, and Jordan Homer, however they withdrew their appeals.

a works, and the diversion of up to 21,000 cubic metres of water per year at a maximum rate of 0.075 cubic metres per second.²

[8] On June 5, 2023, the Director re-issued the Licence to correct unspecified clerical errors.

[9] On June 6, 2023, the Director re-issued Approval 1 to correct unspecified clerical errors.

[10] On June 7, 2023, the Board received Notices of Appeal from Dale Christian, Adele McKechnie, and John McKechnie, appealing the Director's decisions to issue the Licence and Approval 1, and requesting a stay of the Licence and Approval 1 pending a final determination of the appeals.

[11] On June 9, 2023, the Appellants wrote to the Board requesting the Director provide reasons for his decision to issue the Licence and Approval 1, and the reports referenced and incorporated into the Licence and Approval 1.

[12] On June 12, 2023, the Board received Notices of Appeal from Trevor Christian and Tanya Christian, appealing the Director's decisions to issue the Licence and Approval 1, and requesting a stay of the Licence and Approval 1 pending a final determination of the appeal.

[13] On June 13, 2023, the Board acknowledged receipt of the Notices of Appeal, and June 9, 2023 letter from the Appellants. The Board requested the Director provide all the documents and records that he reviewed and were available to him, including policy documents, in making his decision (the "Director's Record"). The Board asked the Authorization Holder to provide a status update regarding when the Authorization Holder intended to undertake the work authorized by the Licence and Approval 1. The Board also asked the Appellants to provide additional information in support of their stay request:

"1. Are the Appellants directly affected by Water Act Approval No. DAUT00012377 and Water Act Licence No. 00432249-00-00 issued to Howell's Excavating Ltd.? This question

² See the Authorizations:

- Licence No. 00432249-00-00 for groundwater diversion;
- Approval No. DAUT0012377 for groundwater disturbance purposes;
- Approval No. DAUT0012378 for flood control purposes; and
- Approval No. DAUT0012379 for end pit lake purposes.

is asked because the Board can only grant a stay where it is requested by someone who is directly affected. Please note the Board makes its on determination on directly affected independent of any decision made by AEPA.

...

2. What are the serious concerns raised by the Appellants that should be heard by the Board?
3. Would the Appellants suffer irreparable harm if the stay is refused?
4. Would the Appellants suffer greater harm if the stay was refused than Howell's Excavating Ltd. would suffer if the Board granted the stay, pending a decision of the Board?"³

[14] The Appellants wrote the Board on June 13, 2023, requesting copies of the reports incorporated into the Licence and Approval 1, and the Director's Record. The Appellants further requested an interim stay pending receipt of the requested information, submissions on the stay application, and the Board's decision on the stay application.

[15] On June 15, 2023, the Board acknowledged receipt of the Appellants' June 13, 2023 letter, and wrote the Parties, asking the Director to advise when the Director could provide: reasons for the Director's decision, the reports incorporated into the Licence and Approval 1, the Director's letter to the Appellants dated May 30, 2023,⁴ and the Director's Record. The Board further requested that the Authorization Holder and the Director provide comments on the Appellants' request for an interim stay pending receipt of the Director's Record and Board's decision on the stay application.

[16] On June 20, 2023, the Authorization Holder wrote the Board advising that it was against the stay application.

[17] On June 20, 2023, the Director stated the Director's Record would be provided by August 25, 2023, and the Director would not be providing reasons for the decision to issue the Authorizations separate from the Director's Record.

[18] On June 22, 2023, the Appellants requested that the submissions process on the directly affected status of the Appellants occur after receipt of the Director's Record.

³ Board's Letter to the Parties, June 13, 2023, at page 3.

⁴ The Director's letter to the Appellants dated May 30, 2023, was the notice of Director's decision. See section 111 of the *Water Act*.

[19] On July 5, 2023, the Appellants advised the Board work was being undertaken on the Property below and within the water table and asked for an interim stay based on the Director not having provided reasons for his decision.

[20] On July 5, 2023, the Board wrote to the Parties acknowledging: the Director's June 20, 2023 letter, the Authorization Holder's June 20, 2023 letter, and the Appellants' letters of June 22 and July 5, 2023. The Board requested the Authorization Holder provide clarification regarding whether work was being undertaken below or within the water table and asked the Appellants to provide more fulsome information related to their application for an interim stay.

[21] On July 6, 2023, the Appellants wrote the Board and advised that they had not received notices of the decision to issue Approvals DAUT00012378 or DAUT00012379, despite those approvals having been issued at the same time as the Licence and Approval 1. The Board acknowledged the Appellants' letter on July 7, 2023, and asked the Appellants to file an amended notice of appeal within seven days.

[22] On July 12, 2023, the Board received amended Notices of Appeal from the Appellants appealing the decisions to issue the Authorizations and requesting a stay of the Authorizations pending a final determination of the appeals. The Board acknowledged receipt of the amended Notices of Appeal on July 14, 2023.

[23] On September 1, 2023, the Director provided the Director's Record to the Board. The Board distributed the Director's Record to the Parties on September 6, 2023.

[24] On September 5, 2023, the Appellants requested the Board issue a stay of the Authorizations pending the final determination of the appeals. The Appellants also provided their initial submission (the "Appellants' Initial Submission") in support of their stay application. The Appellants' Initial Submission included a report titled *Re: Howell's Excavating Ltd. Palkot Pit Development*, Angus Chu, University of Calgary dated August 27, 2023 (the "Chu Report"), and a second report, also titled *Re: Howell's Excavation Ltd. Palkot Pit Development*, Vance Buchwald dated August 29, 2023 (the "Buchwald Report").

[25] On September 28, 2023, the Board set a schedule for submissions on the stay application and requested submissions from the Parties. Submissions were received between September 28, 2023, and October 4, 2023.

[26] In the Appellants' Initial Submission, the Appellants disputed whether the Board needed to find a party directly affected to issue a stay or prior to the hearing of the appeal. On September 28, 2023, the Board sought comments from the Director and Authorization Holder regarding the Appellants' arguments and received comments from the Director and Authorization Holder on October 3 and October 4, 2023, respectively.

[27] On October 6, 2023, the Board provided an opportunity for the Appellants to supplement their submissions and adjusted the submission process to reflect whether the Board needed to determine the directly affected status of the Appellants before proceeding with the stay application or prior to the hearing of the appeal.

[28] On October 16, 2023, the Appellants filed supplementary submissions on directly affected, informed the Board that the Chu Report and the Buchwald Report had been previously filed and informed the Board that John Harris, Sybil Harris, Stacey Homer, and Jordan Homer had withdrawn their appeals.⁵

[29] On October 23, 2023, the Authorization Holder provided their response submission (the "Authorization Holder's Response Submission"). The submission included a letter dated October 20, 2023, titled *2023 Response to Appellant Letter Palkot Pit SE-13-36-02 W5M, Near Innisfail Alberta*, by Waterline Resources Inc. ("Waterline") responding to the Chu Report (the "2023 Waterline Report").

[30] On October 23, 2023, the Director provided his submission (the "Director's Response Submission").

[31] On October 23, 2023, the Authorization Holder conceded that Adele McKechnie, John McKechnie, Trevor Christian, and Tanya Christian likely met the standard of directly affected.⁶

⁵ October 16, 2023 Letter from Wilson Laycraft to the Board.

⁶ Authorization Holder's Response Submission at paragraph 31.

[32] On October 30, 2023, the Appellants provided their rebuttal submission (the “Appellant’s Rebuttal Submission”) including a letter titled *Re: Response to Waterline Response to Appellants Comments of Howell’s Excavating Ltd*, prepared by Angus Chu and dated October 29, 2023.

[33] In addition to the above documentation, the Board also reviewed the following documents included in the Director’s Record:

- *Application under the Code of Practice for Pits. Palkot Pit, Howell’s Excavating Ltd., SE 13-036-02-W5*, dated June 2020 (the “Code of Practice Application”).⁷
- *Application under the Water Act Palkot Pit, Howell’s Excavating Ltd., SE 13-036-02-W5*, dated June 2020 (the “Amisk Creek Application”).⁸
- *Hydrogeological Investigation Proposed Aggregate Development SE-13-036-02 W5M Near Innisfail, Alberta* dated June 17, 2020 (the “2020 Waterline Report”).⁹

The Director incorporated these reports by reference into the Licence and Approval 1, as Reports DAPPL0002317R-001, DAPPL0002317R-002, and DAPPL0002317R-003, respectively.

2.2 The Palkot Pit

[34] The Authorization Holder made an application under the *Water Act* in relation to the development and operation of a gravel pit (the “Proposed Project”). The Proposed Project is located approximately 18 kilometres northwest of the Town of Innisfail and 11.4 kilometres from Spruceview, within Red Deer County.¹⁰ The site is located approximately 900 metres north of the Red Deer River, 870 metres west of the Medicine River, and approximately 1,000 metres south of the Dickson Creek inlet to the Medicine River.¹¹

⁷ Director’s Record at Tab 10.

⁸ Director’s Record at Tab 11. The Board notes that while the heading on page 1 of the Report includes the phrase “pit to pit dewatering” the body of the Report states there will be no pit to pit dewatering.

⁹ Director’s Record at Tab 7.

¹⁰ Amisk Creek Application at page 1; Director’s Record at Tab 2.

¹¹ *Flood Assessment on Red Deer and Medicine Rivers for Palkot Pit at Red Deer County*, Westoff Engineering Resources Inc., June 25, 2020, (“Code of Practice Application”) at page 11; Director’s Record at Tab 8.

[35] The Proposed Project will disturb 49.8 hectares. The development and operation of the Proposed Project will occur over a period of 15 to 20 years, with progressive reclamation throughout. The first phase, covering 18.5 hectares, includes the processing area.¹²

[36] Much of the gravel on the Property is below the water table requiring wet excavation throughout most of the operations. Gravel washing will occur from May to September as sales demand require it.¹³

[37] Two end pit lakes totaling 18.1 hectares will also be constructed as part of the final reclamation of the Property. One end pit lake will cover 8.7 hectares in the northeast corner of the Property (“Waterbody No. 1”), and the other end pit lake will cover 7.9 hectares in the southeast corner of the Property (“Waterbody No. 2”).¹⁴

[38] Flood berms along the north and east boundaries of the gravel pit will be constructed to prevent surface water flowing onto adjacent lands.¹⁵

3. ISSUES

[39] The Board set the following issues for the stay application:

1. Is there a requirement for the Board to decide that an appellant requesting a stay is directly affected before issuing a stay?
2. Is there a requirement for the Board to decide that an appellant is directly affected before proceeding to a hearing of an appeal?
3. Who bears the onus of proving that an appellant is directly affected?
4. Are the Appellants directly affected by the Approvals and Licence issued to Howell’s Excavating Ltd.? Please note that the Board makes its own decision on directly affected independent of any decision made by the Director.
5. What are the serious concerns raised by the Appellants that should be heard by the Board?
6. Would the Appellants suffer irreparable harm if the stay is refused?

¹² Code of Practice Application at pages 12 and 17; Director’s Record at Tab 8.

¹³ Amisk Creek Application at page 1; Director’s Record at Tab 2.

¹⁴ Code of Practice Application at Figure 9; Director’s Record at Tab 8.

¹⁵ Amisk Creek Application at page 3; Director’s Record at Tab 2.

7. Would the Appellants suffer greater harm if the stay was refused than Howell's Excavating Ltd. would suffer if the Board granted the stay, pending a decision of the Board?
8. Would the overall public interest warrant a stay?¹⁶

4. SUBMISSIONS

[40] The Director took no position on the stay application but noted that the onus is on the person filing the notice of appeal to demonstrate, on a preliminary basis, that they are directly affected by the director's decision.¹⁷

4.1 Directly Affected

4.1.1 Appellants

[41] John McKechnie, Adele McKechnie, Tanya Christian, and Trevor Christian stated they are owners of land adjacent to the Property. The Appellants stated Dale Christian resides within 500 metres of the Property.

[42] The Appellants stated the land immediately to the east of the Property is owned by Trevor Christian, with the legal description of SW-18-36-1-W5. The Appellants stated the property was previously transferred by Dale Christian and her late husband, Glennis Roy Christian, to Trevor Christian. Despite having transferred the property, Dale Christian maintains a mortgage on the title of the property and continues to operate a cattle operation on the land. The Appellants further stated Dale Christian uses the water wells on the land for her personal consumption.¹⁸

[43] The Appellants stated the water for their wells is drawn from a shallow, unconfined aquifer, and that the wells are hydraulically connected to the Red Deer and Medicine Rivers.¹⁹ The Appellants noted the Authorization Holder plans to disturb the same aquifer and argued the disturbance will expose the aquifer to outside forces and have a deleterious impact on the

¹⁶ Board's Letter October 6, 2023.

¹⁷ Director's Response Submission at pages 1 and 3.

¹⁸ Appellants' Rebuttal Submission at paragraphs 6, 7, 8, and 9.

¹⁹ Appellants' Initial Submission at paragraph 12, citing the Waterline Report dated June 17, 2020, at page 3.

Appellants.²⁰ The Appellants argued the Authorizations will have three impacts on the McKechnie and Christian wells:

1. The Christian well is downgradient of the Property. Any contaminant entering the aquifer from the gravel pit will move towards the Christian well.
2. A 16.5 cm increase in the aquifer could potentially reverse the aquifer's natural flow, causing the aquifer to flow toward the McKechnie wells and any contaminants that enter the aquifer to travel to the McKechnie wells.
3. Removal of the overburden and subsequent gravel operations will expose the aquifer, and the Christian and McKechnie wells to contaminants.

[44] The Appellants relied on *Normtek Radiation Services Ltd. v. Alberta Environmental Appeals Board*, 2020 ABCA 456 (“*Normtek*”) and argued they “... need only show that they are subject to a potential adverse impact in order to be granted directly affected status.”²¹

[45] The Appellants provided the Chu Report and the Buchwald Report, and argued both reports confirm an adverse effect on the environment, human health, safety, property interests and a natural resource.²²

[46] The Appellants stated the Director had found the Appellants directly affected when the Appellants had filed their statements of concern.²³

4.1.2 Authorization Holder

[47] The Authorization Holder noted the standard for providing a *prima facie* case of being directly affected is very low, and that while they did not agree with much of the evidence presented by the Appellants, conceded that John McKechnie, Adele McKechnie, Trevor Christian, and Tanya Christian likely met the standard for being directly affected.²⁴

²⁰ Appellants' Supplemental Submission at paragraph 50.

²¹ Appellants' Supplemental Submission at paragraph 36.

²² Appellants' Supplemental Submission at paragraph 49, citing paragraphs 13 to 40 of the Appellants' Initial Submission.

²³ Appellants' Supplemental Submission at paragraph 54.

²⁴ Authorization Holder's Response Submission at paragraph 31.

[48] The Authorization Holder requested clarification regarding Dale Christian, arguing the Appellants had not provided enough evidence to create a *prima facie* case proving that she is a resident of surrounding properties or directly affected by the Director's decision.²⁵

4.1.3 Analysis

[49] Section 115(1)(a)(i) of the *Water Act* provides:

“A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

- (a) if the Director issues or amends an approval, a notice of appeal may be submitted
 - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108,”

[50] Section 115(1)(a)(i) requires that a person filing a notice of appeal must be directly affected by the Director's decision. Section 91(1)(a)(i) of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (“EPEA”) similarly requires a person filing a notice of appeal to be directly affected by the Director's decision. Following the Court of Appeal's direction in *Normtek*, the Board recently considered the term “directly affected” in *McMillan et. al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp.* 19-066-71, 074, 081, and 083-085-ID4, 2022 ABEAB 22 (“*McMillan*”), setting out a three-part test which an appellant must meet (the “*McMillan Test*”):

1. Is there a personal or private interest, consistent with the underlying policies of the applicable statutes, being asserted by a person?
2. Is there an adverse effect to the identified interest?
3. Is the adverse effect to the identified interest direct?

[51] The Board has set out several guiding principles to assist the Board in the application of the directly affected test. These principles include:

- “1. The Board will determine the directly affected status of an appellant on a case-by-case basis, considering the varying circumstances and facts of each appeal;
2. The Board will examine the adverse effects alleged by the appellant of the Director's decision or the activity authorized by the Director's decision on (a) the environment, (b) human health, (c) safety, or (d) property interests. The Board may

²⁵ Authorization Holder's Response Submission at paragraphs 32 and 33.

also examine (a) social, (b) economic, and (c) cultural impacts alleged by the appellants of the Director's decision or the activity authorized by the Director's decision if those impacts directly affect the appellant's identified interests;²⁶

3. The Board will examine the harm to a natural resource, which an appellant uses, or harm to an appellant's use of a natural resource. This may be sufficient to find an appellant directly affected, but it is not a prerequisite to establishing an appellant is directly affected where other adverse effects are alleged;
4. The Board will interpret "directly" as meaning the Director's decision must have a clear and uninterrupted chain of cause and effect, which links the decision to the appellant's identified interest. The effect must be one that will occur immediately or without delay and not at an undetermined time in the future. Some types of future harm, but not all, may be too remote or speculative to be considered direct;
5. The Board will interpret "affected" as meaning the Director's decision or the activity authorized by the Director's decision will harm or impair the appellant's identified interests. Directly affected connotes an adverse impact;
6. The Board will consider the nature and merits of the appellant's notice of appeal when considering if they are adversely affected by the Director's decision or the activity authorized by the Director's decision. The appellant must provide *prima facie* evidence to support their position they are directly affected. This evidence need only establish a reasonable possibility they will be directly affected; and
7. The Board may summarily dismiss a notice of appeal where it determines the appellant is not directly affected, but such summary dismissal can only be made after there has been some consideration of the merits of the appellant's appeal."²⁷

[52] The Board avoids defining in advance the circumstances in which an appellant might be found directly affected. The Board interprets "directly affected" as limiting the class of persons who can appeal a director's decision. However, the Board retains broad discretion to determine who is directly affected.

[53] The Authorization Holder conceded that John McKechnie, Adele McKechnie, Trevor Christian, and Tanya Christian likely met the standard of providing a prima facie case of directly affected. The Authorization Holder requested additional information regarding Dale

²⁶ *Normtek* at paragraphs 79, 83, 85, and 135.

²⁷ *McMillan* at paragraph 58. See also: *Normtek* at paragraphs 78, 79, 81, 83, 135, 136, and 141. Also see: Rule 29 of the Board's *Rules of Practice*; *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D, (AEAB), 1998 ABEAB 42 at paragraph 25; *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D at paragraphs 24 and 26; *Leduc (No 25) v. Local Authorities Board* (1987), 84 AR 361 at paragraphs 11 and 12, 54 Alta LR (2d) 396 (ABCA).

Christian, arguing she had not provided enough evidence to establish a prima facie case that she was directly affected by Authorizations.

[54] The Proposed Project is adjacent to property owned by the Appellants and within 500 metres of Dale Christian's residence. Dale Christian further stated that she operates a cattle business on the property owned by Trevor Christian. All the Appellants have or use water wells which draw water from a shallow, unconfined aquifer. The wells are hydraulically connected to the Red Deer and Medicine Rivers. The Proposed Project will disturb the aquifer and the Appellants have raised concerns regarding the effects of the disturbance to their water wells.

[55] The Director did not challenge whether the Appellants were directly affected. In all but the case of Dale Christian, this has not been challenged by the Authorization Holder. The Appellants have raised environmental, health, safety, and property interests, satisfying the first step of the *McMillan Test*. Moreover, the Appellants have demonstrated that the Director's decision to issue the Authorizations will potentially impact: the environment, their health, safety, and property interests, satisfying the second and third step of the *McMillan Test*.

[56] Therefore, the Board finds the Appellants are directly affected by the Director's decision to issue the Authorizations.

[57] During the stay application process, the Board had asked the Parties for submissions on the following additional issues:

1. Is there a requirement for the Board to decide that an appellant requesting a stay is directly affected before issuing a stay?
2. Is there a requirement for the Board to decide that an appellant is directly affected before proceeding to a hearing of an appeal?
3. Who bears the onus of proving that an appellant is directly affected?

As the Board has found all the Appellants directly affected, there is no longer a need for the Board to decide if an appellant requesting a stay is directly affected prior to issuing a stay, or to decide if an appellant must be directly affected prior to proceeding to the hearing of an appeal. The Board

does note however, that the onus is generally on an appellant to demonstrate that he or she is directly affected.²⁸

4.2 Stay Application

4.2.1 What are the Serious Concerns Raised by the Appellants That Should be Heard by the Board?

4.2.1.1 Appellants

[58] The Appellants argue there are several issues to be tried which meet and exceed, the threshold of a serious question to be tried, including:

- “1. In granting the Approvals, did the Designated Director properly weigh and consider the Approvals’ effects on household users, traditional agricultural users and public safety, in accordance with section 38(2) of the *Water Act*;
2. In granting the Approvals, did the Designated Director properly weigh and consider the Approvals’ effects on the aquatic environment and the aquifer in accordance with section 38(2) of the *Water Act*;
3. Are the [Authorizations] conditions adequate to protect the Appellants, the aquatic environment and the aquifer.
4. Did the Designated Director fetter his discretion by applying the Code of Practice for Pits and the Guide to Water Act as binding documents; and
5. In granting the [Authorizations], did the Designated Director properly apply the precautionary principle.”²⁹

[59] In their rebuttal submissions, the Appellants identified the issues as including “... a) the quality of the Appellants’ drinking water, b) the quality of water in an aquifer, and c) the quality of water in the Medicine River”.³⁰

²⁸ See Rule 29 of the Board’s Rules of Practice, which states “Any Party offering evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.” See also *Normtek* at paragraph 138.

²⁹ Appellants’ Initial Submission at paragraph 49.

³⁰ Appellants’ Rebuttal Submission at paragraph 18.

4.2.1.2 Authorization Holder

[60] The Authorization Holder did not contest the first part of the test and conceded that the Appellants were not acting in a frivolous or vexatious manner, and therefore met this minimal threshold.³¹

4.2.2 Would the Appellants Suffer Irreparable Harm if the Stay is Refused?

4.2.2.1 Appellants

[61] The Appellants advanced two arguments to demonstrate irreparable harm:

1. impacts to human health; and
2. irreparable harm to the Medicine River and its fisheries caused by contaminants entering the aquifer.

[62] The Appellants stated their wells draw water from the same aquifer as the Authorization Holder proposes to use for its gravel extraction activities. The Appellants argued that contaminants entering the aquifer from the Property will impact them. The Appellants further argued many of those contaminants, including the light nonaqueous phase liquids have direct and negative impacts on human health.³²

[63] The Appellants relied on evidence included in the Chu Report, which noted that the reports appended to the Authorizations failed to provide any information to the Director on the impacts to the McKechnie wells. The Appellants further noted that the Chu Report stated that these reports concluded there would be no impact and that, accordingly, the Director did not consider those effects.

[64] The Chu Report identified the following impacts on the Appellants' wells:

1. The Christian and Harris wells are downgradient of the Property. This means that contaminants that enter the aquifer from the Pit will move towards the Christian and Harris wells.
2. Because of the low gradient of this region, a 16.5 cm increase in the aquifer will reverse the aquifer's natural flow, causing the aquifer to flow toward the McKechnie wells. This means that a 16.5 cm rise in the water level would cause contaminants that enter the aquifer from the waterbody #2 gravel pit to move toward the McKechnie wells.

³¹ Authorization Holder's Response Submission at paragraph 40.

³² Appellants' Initial Submission at paragraph 72.

3. Removing the overburden and subsequent gravel operations will expose the aquifer, and thereby the Christian, Harris and McKechnie wells, to contaminants.

[65] The Appellants also argued irreparable harm to the Medicine River and its fisheries caused by contaminants entering the aquifer. Relying on the Buchwald Report, the Appellants argued there was already significant pressures on the Medicine River. The Appellants further argued that adding more pressure, specifically by increasing nitrate levels, will negatively impact fisheries in that river.³³ Fish present in the river include walleye, northern pike, goldeye, mooneye, white sucker, longnose sucker, and shorthead redhorse sucker.³⁴

4.2.2.2 Authorization Holder

[66] The Authorization Holder noted irreparable harm relates to the nature of the harm and not the magnitude of the harm. The Authorization Holder stated irreparable harm must either be harm that cannot be quantified in monetary terms, or which cannot be cured.

[67] The Authorization Holder relied on *WIC Premium Corp. v. General Instrument Corp.*, 2000 ABQB 628, (“*WIC Premium Corp.*”)³⁵ arguing that the Appellants must demonstrate to the Board that the harm contemplated is clear and non-speculative.

[68] The Authorization Holder submitted that:

1. The aquifer under the Property is not a previously closed system and has already been affected by human activities, including the development of drainage ditches, underground utilities lines, and previous gravel pits.³⁶
2. Surface water runoff is not anticipated to enter the site from off-site locations. The planned development includes berms located along the northern and eastern property boundaries. Drainage from Highway 54 to the south of the site is anticipated to be directed into the ditches adjacent to the roadway and not travel overland towards the site during typical conditions.³⁷
3. With respect to the McKechnie wells, the contribution of surface water runoff to the end-pit water bodies was anticipated to be negligible and therefore could not raise the groundwater levels by 16.5 cm and reverse the groundwater gradient as

³³ Appellants’ Initial Submission at paragraph 71.

³⁴ Buchwald Report at page 2.

³⁵ Authorization Holder’s Response Submission at paragraph 43, citing *WIC Premium Corp.* at paragraph 78.

³⁶ 2023 Waterline Report at page 2.

³⁷ 2023 Waterline Report at page 3.

suggested by Dr. Chu. His suggestion is conjectural and does not consider the hydraulic conductivity of the aquifer.³⁸

4. Monitoring wells on the Property and the distance to the Christian property would prevent any impact to the Christian property. This finding is also supported by the Government of Alberta report: Guide to Water Act: Authorization Required for Excavations (Dugouts, Borrow Pits and other types of Pit/Excavations 2022) which states that locations more than 400 metres from a site are effectively outside of the range of impact.³⁹

[69] The Authorization Holder submitted the harm identified in the Chu Report is speculative, does not accurately reflect the reality on site, and does not consider the monitoring requirements set out in the Authorizations. The Authorization Holder argued the harm was speculative and as such, does not meet the high standard required to prove that the Appellants would suffer irreparable harm if the stay is not granted.

4.2.3 Would the Appellants Suffer Greater Harm if the Stay was Refused Than Howell's Excavating Ltd. Would Suffer if the Board Granted the Stay, Pending a Decision of the Board?

4.2.3.1 Appellants

[70] The Appellants submitted that the balance of convenience generally favours maintaining the status quo. The Appellants relied on *Fuller Western Rubber Linings Ltd. v. Spence Corrosion Services Ltd.*, 2012 ABCA 92 (“*Fuller Western Rubber Linings Ltd.*”), and *409790 Alberta Ltd. v. Transwest Energy Inc.*, 1997 ABCA 39 (“*409790 Alberta Ltd.*”),⁴⁰ arguing the balance of convenience favours them because the harm to the Appellants’ health is real and the harm to the Medicine River is significant. The Appellants argued the harm to the Authorization Holder by contrast, is a delay.⁴¹

[71] The Appellants further argued that the Authorization Holder had not provided evidence to substantiate the Authorization Holder’s claim that a stay would impact its ability to

³⁸ Authorization Holder’s Response Submission at paragraph 52, citing the 2023 Waterline Report at page 4.

³⁹ Authorization Holder’s Response Submission at paragraphs 53 and 54.

⁴⁰ *Fuller Western Rubber Linings Ltd.* at paragraph 4, Appellants’ Authorities at Tab 16; *409790 Alberta Ltd.* at paragraph 8, Appellants’ Authorities at Tab 17.

⁴¹ Appellants’ Initial Submission at paragraphs 75 to 77.

effectively plan or manage the resource,⁴² or the harm the Authorization Holder stated it would suffer, either financially or regarding the need to downsize.⁴³

[72] The Appellants argued that the potential loss claimed by the Authorization Holder does not compare to the loss to the Appellants of having contaminated wells.⁴⁴

4.2.3.2 Authorization Holder

[73] The Authorization Holder argued it would suffer greater harm if the stay was granted due to a serious disruption to its present and future business:

1. It will have to cancel bids or source aggregate material from other sites that are becoming depleted;
2. It has invested \$2,300,000.00 in the Proposed Project;
3. It will lose approximately \$2,500,000.00 in revenue if the interim stay is granted as it will be unable to tender for projects during that time;
4. It may miss the opportunity to put in bids for the pricing for aggregate supply for the next phase of the Highway 11 twinning project; and
5. It will need to downsize its staff by approximately 20 to 25 people from currently 50 local people.⁴⁵

4.2.4 Would the Overall Public Interest Warrant a Stay?

4.2.4.1 Appellants

[74] The Appellants made no direct submissions on public interest. However, the Board considers their concerns regarding the harm to the Medicine River and its habitat as concerns related to the public interest, specifically the protection of the environment, which they argue may be affected by the Authorizations.

4.2.4.2 Authorization Holder

[75] With respect to the effects on the Medicine River and fish, the Authorization Holder relied on the test for a stay as set out in *RJR-MacDonald*,⁴⁶ arguing that harm to the public interest

⁴² Appellants' Initial Submission at paragraph 79.

⁴³ Appellants' Rebuttal Submission at paragraphs 19 to 27.

⁴⁴ Appellants' Rebuttal Submission at paragraph 29.

⁴⁵ Authorization Holder's Response Submission at paragraphs 61 to 64.

⁴⁶ *RJR-Macdonald* at paragraph 73.

is to be assessed as a part of the third stage of the test when assessing the balance of convenience between the parties.

[76] The Authorization Holder submitted that the Director is a public authority operating within authority established under the *Water Act*, and that his decision to grant the Authorizations is consistent with this authority. The Authorization Holder further submitted the public interest favours continuation of that action.⁴⁷

5. ANALYSIS

[77] The fundamental question before the Board in a stay application is whether granting the stay would be just and equitable in all the circumstances.⁴⁸

[78] The Board's authority to grant a stay is found in section 97 of EPEA, which provides in part:

“(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.

(2) The Board may, on application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted.”

[79] Granting a stay is an extraordinary remedy. To guide the Board in exercising its discretion, the Board has adapted its test for a stay from the Supreme Court of Canada case of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 (“*RJR-Macdonald*”),⁴⁹ as stated in previous decisions.⁵⁰ The steps in the test, as stated in *RJR-MacDonald*, are:

“First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be

⁴⁷ Authorization Holder's Response Submission at paragraph 69.

⁴⁸ *Cleanit Greenit* at paragraph 33.

⁴⁹ In *RJR-MacDonald*, the Court adopted the test as first stated in *American Cyanamid v. Ethicon*, [1975] 1 All ER 504. Although the steps were originally used for interlocutory injunctions, the courts have stated the application for a stay should be assessed using the same three steps. See: *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 SCR 110 at paragraph 30 and *RJR-MacDonald* at paragraph 41.

⁵⁰ See *Przybylski v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd.*, 2022 ABEAB 31; *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.*, 1998 ABEAB 16; and *Northcott v. Director, Northern Region, Regional Services, Alberta Environment re: Lafarge Canada Inc.*, 2005 ABEAB 6.

made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.”⁵¹

[80] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant must demonstrate through the evidence submitted that there is some basis for presenting an argument. As not all the evidence is before the Board at this time, the Board will not undertake a prolonged examination of the merits of the appeal.⁵²

[81] The second step of the test requires the Board to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other.

[82] Irreparable harm was defined by the Alberta Court of Appeal in *Ominayak v. Norcen Energy Resources*, 1985 ABCA 12 (“*Ominayak*”):

“[b]y irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.”⁵³

[83] The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done, must show there is a real risk that harm will occur. It cannot be mere speculation. Damages that third parties suffer can also be considered.⁵⁴

[84] The third step in the test is the balance of convenience. Here the Board must determine which of the parties will suffer the greater harm from the granting or refusal of a stay pending a decision on the merits.”⁵⁵ The Board is required to weigh the burden the stay would impose on the Authorization Holder against the benefit the Appellants would receive. This weighing is not strictly a cost-benefit analysis but, rather, a consideration of significant factors,

⁵¹ *RJR-MacDonald* at paragraph 43.

⁵² *RJR-MacDonald* at paragraph 50.

⁵³ *Ominayak* at paragraph 31, citing *The Law of Injunctions*, 4th edition, volume 1, at page 34.

⁵⁴ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] AJ No. 1001 (Q.B.) (“*Edmonton Northlands*”) at paragraph 78.

⁵⁵ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 SCR 110 at paragraph 36.

such as the cumulative effect of granting a stay,⁵⁶ third parties who may suffer damage,⁵⁷ or the reputation and goodwill of a party will be affected.⁵⁸

[85] In the third stage of the test, any alleged harm to the public is to be assessed. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."⁵⁹

[86] Finally, the Board notes in *Cleanit Greenit Composting System Inc. v. Director (Alberta Environment and Parks)*, Feth, J. found that "the three stages are not airtight compartments. To some extent, strength in one part of the analysis can compensate for weakness in another, especially the second and third branches which are "inexorably linked and should be considered together".⁶⁰ Together, all these factors guide the Board's exercise of discretion.

5.1 What are the Serious Concerns Raised by the Appellants That Should be Heard by the Board?

[87] The first step of the *RJR-MacDonald* test is whether there is a serious issue to be determined. This part of the test requires the applicant to demonstrate, through the evidence submitted, that there is some basis on which to present an argument. As not all the evidence will be before the Board at the time the decision regarding the stay is made, "... a prolonged examination of the merits is generally neither necessary nor desirable."⁶¹

[88] In this case, the Appellants argued there are several issues to be tried which meet and exceed, the threshold of a serious question to be tried. These include whether the Director properly weighed and considered the Approvals' effects on household users, traditional agricultural users, and public safety, and on the aquatic environment and aquifer pursuant to section 38(2) of the *Water Act*. The Appellants further challenged whether the Authorizations' terms and conditions are adequate to protect the Appellants, the aquatic environment and aquifer.

⁵⁶ *MacMillan Bloedel v. Mullin*, [1985] BCJ No. 2355 (CA) at paragraph 121.

⁵⁷ *Edmonton Northlands* at paragraph 78.

⁵⁸ *Edmonton Northlands* at paragraph 79.

⁵⁹ *RJR-MacDonald* at paragraph 66.

⁶⁰ *Cleanit Greenit Composting System Inc. v. Director (Alberta Environment and Parks)*, 2022 ABQB 582 ("*Cleanit Greenit*") at paragraph 32.

⁶¹ *RJR-MacDonald* at paragraph 50.

[89] The Authorization Holder conceded that the threshold for meeting a serious issue to be tried is low and recognized that the Appellants are not acting in a frivolous or vexatious manner and have met this minimal threshold.

[90] The Appellants have challenged several aspects of the Authorizations, have raised issues regarding water quality, and how users downstream of the Proposed Project may be affected. The Board notes the Authorization Holder has acknowledged that the Appellants are not acting in a frivolous or vexatious manner. The Board finds the threshold of raising a serious issue is satisfied.

5.2 Would the Appellants Suffer Irreparable Harm if the Stay is Refused?

[91] The Appellants argued they would suffer irreparable harm if contaminants caused by the Proposed Project entered the aquifer, which would negatively affect their wells. The Appellants further submitted that contamination could enter the aquifer and affect the Medicine River and its habitat.

[92] At this stage of the analysis, the Board relies on *prima facie* evidence. The evidence will be further tested through examination or cross-examination at the hearing of the appeals.

[93] Based on its review of the filed evidence and submissions, the Board finds that allegations of harm to the Appellants are not supported by the evidence and are speculative. The Board reviewed the Chu Report, the Waterline 2020 Report, and the Waterline 2023 Report.

[94] With respect to the quality of water in the aquifer, the Board notes that the aquifer has already been affected by human activities, including the development of drainage ditches, underground utilities lines, and previous gravel pits including a reclaimed end-pit lake located on the McKechnie property.

[95] Dr Chu expressed concern that contaminants entering the aquifer will impact the Christian wells. Dr. Chu also expressed concern about the removal of the overburden upgradient of the Christian wells, stating that it would increase the risk of contaminants on the surface entering their water supply. He expressed concerns with potential contamination of water from hydrocarbon and chemicals used on the Property, along with stormwater from Highway 54 and fertilizers from adjacent farming operations.

[96] The 2020 Waterline Report states that the likelihood and magnitude of contamination of the aquifer due to the Proposed Project are anticipated to be low. Waterline explains that the Authorization Holder is not proposing to conduct fueling at the site, that no maintenance chemicals would be stored onsite including hydraulic fluid, oil, or fuel. Onsite oil changes will occur but are only required for the crushing and screening equipment.⁶² The 2020 Waterline Report further states that "... [a]lthough the risk of a spill due to heavy equipment operation or agricultural operations cannot be totally eliminated, the hazardous waste, chemical and mitigation plan will reduce the risk significantly".⁶³ The 2023 Waterline Report reiterates that the Authorization Holder is not proposing to conduct fueling at the site, that no maintenance chemicals would be stored onsite including hydraulic fluid, oil, or fuel. The 2023 Waterline Report also states that while onsite oil changes will occur, they are only required for the crushing and screening equipment. The Authorization Holder's evidence is that it will implement a monitoring program to detect contaminants and install berms along the property boundaries. The measures as implemented by the Authorization Holder are designed to prevent contaminants from entering the aquifer and affecting downgradient wells.

[97] The Parties have submitted conflicting evidence regarding the risks posed to the aquifer by the Proposed Project. At this stage of the appeal process, the evidence before the Board is currently untested by examination or cross examination, and it is not until the merits hearing of the appeals, that the Board will be able to decide on the actual risk of contamination to the aquifer and contamination to the Appellants' wells. For this stay application, the Board must decide if the evidence shows the potential for irreparable harm to the Appellants' wells before a resolution of the appeals.

[98] The Christian's wells (Wells 9, 9a, 9b, 9c and 9d) are located east and downgradient of the Property. These wells were included in the modelling prepared for the 2020 Waterline Report. The 2020 Waterline Report examined the worst-case scenarios to model the time for

⁶² Waterline Report 2020 at page 6, 1.9; Director's Record at Tab 7.

⁶³ Waterline Report 2020, at pages 21 and 22; Director's Record, at Tab 7.

contaminants to travel to downgradient wells. The modelling showed that it would take approximately:

1. 45 days to water well 10 (apparently inactive and/or dry).
2. 100 days to water well 8 (apparently used for stock watering).
3. 2.5 years to domestic wells 9, 9a, 9b, 9c and 9d.
4. 3 years to domestic water wells 6 and 6a.⁶⁴

[99] The Board finds that the 2020 Waterline Report is the best evidence available to the Board at this stage of the proceedings regarding the timing of contaminants traveling to the wells downgradient of the Property. The 2020 Waterline Report shows little to no risk of irreparable harm to the Christian wells from contaminants entering the aquifer before a resolution of the appeals, even under the worst-case scenario.

[100] The 2020 Waterline Report further states that "...pumping at neighbouring water wells was not predicted to alter the local groundwater regime. Therefore, actively pumped water wells located upgradient of the site are not predicted to capture potential contaminants released at the site."⁶⁵ This conclusion is applicable to the McKechnie wells.

[101] Regarding the potential effect on the McKechnie wells, Angus Chu's hypothesis is that with the low gradient of the region, a 16.5 cm increase in the level of Waterbody #2, located to the east of the McKechnie wells, would be sufficient to reverse the aquifer's natural flow, causing the aquifer to flow toward the McKechnie wells. Dr. Chu wrote: "stormwater runoff into the pond *could very well increase the level of this waterbody by this magnitude or higher.*" (*Emphasis added by the Board.*)⁶⁶ The Board finds Dr. Chu's conclusion is based on hypothetical and conjectural circumstances. There is no evidence that the level of Waterbody #2 will rise before a resolution of the appeals or at all. In addition, even assuming the risk of contaminant migration to the McKechnie wells was possible, the timing of the construction of the end pit lakes during the reclamation phase, confirms there is no risk of any harm before the resolution of the appeals.

⁶⁴ Waterline Report 2020 at page 19; Director's Record at Tab 7.

⁶⁵ Waterline Report 2020 at page 19; Director's Record at Tab 7.

⁶⁶ Chu Report at page 3.

[102] Regarding the adverse effects on the Medicine River and fish, the Board notes the Medicine River is farther away than any of the wells identified in the 2020 Waterline Report. The Board finds the adverse effects to the Medicine River and fish as argued by the Appellants to be speculative, and unlikely to occur before a resolution of the appeals, based on the time it would take contaminants to travel to the Medicine River.

5.3 Would the Appellants Suffer Greater Harm if the Stay was Refused Than the Authorization Holder Would Suffer if the Board Granted the Stay, Pending a Decision of the Board?

[103] The Authorization Holder argued it would suffer greater harm if the stay was granted due to a serious disruption to its present and future business. The Authorization Holder also submitted that it had invested \$2,300,000 in the Proposed Project, that it stands to lose \$2,500,000 in revenue, it will miss business opportunities, and will have to downsize its staff.

[104] The Appellants argue the Authorization Holder provided no evidence to support any of their assertions of losses. The Board agrees.

[105] However, the Appellants have the onus to prove that the refusal to grant a stay would cause them irreparable harm. The Appellants have failed to establish that such irreparable harm would occur before a resolution of the appeals. As the evidence at this time does not establish irreparable harm, there is no need for the Board to decide if the balance of convenience would favour the granting of a stay.

5.4 Would the Overall Public Interest Warrant a Stay?

[106] In making its decision the Board must assess and compare the Appellants' position with that of the public in assessing the balance of convenience; the Appellants must show public interest benefits will result from granting the stay. In making this consideration, the Board notes:

“[i]n the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant ... The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility.”⁶⁷

⁶⁷ *RJR-MacDonald* at paragraph 76.

[107] Further, in determining the public interest, the Supreme Court directs the Board to look to the authority that is charged with the duty of promoting or protecting the public interest.

[108] The Director is a public authority established under the *Water Act*. His decision to grant the Authorizations is consistent with this authority and as such the public interest generally favours his decision.

5.5 Is a Stay Just and Equitable?

[109] As mentioned previously, the granting of a stay by the Board is an extraordinary remedy. While the three steps of the *RJR-MacDonald* stay test guide the Board's exercise of discretion, the fundamental question remains whether granting a stay is just and equitable in all the circumstances.⁶⁸

[110] The Board notes that the aquifer in question has already been impacted by activities such as gravel extraction. Moreover, the potential harm to the Appellants' wells and the Medicine River as argued by the Appellants are unlikely to occur before a resolution of the appeals. Therefore, the Appellants have not demonstrated an irreparable harm. In contrast, the Authorization Holder has argued that a stay of the Authorizations will disrupt its business operations and cause financial losses, as it will not be able to manage the resource or acquire revenue from the Proposed Project during the stay. The harm the Authorization Holder has described are the logical consequences of a disruption to the Authorization Holder's business operations. The Board finds a stay at this stage of the appeals would cause harm to the Authorization Holder and be of little benefit to the Appellants before the appeals are heard.

[111] In summary, the Board is of the view that granting a stay would not be just and equitable and declines to grant a stay.

6. DECISION

[112] The Board has determined the Appellants are directly affected by the Authorizations.

⁶⁸ *Cleanit Greenit* at paragraph 33.

[113] The Board has determined that it would not be just and equitable to grant a stay, therefore, the Board declines to grant a stay of the Authorizations. The Appellants' application for a stay is dismissed.

Dated on May 13, 2024, at Edmonton, Alberta.

-original signed by-

Chris Powter
Acting Board Chair

-original signed by-

Line Lacasse
Board Member

-original signed by-

Kurtis Averill
Board Member